

BIBLICAL LAWS OF TALION

by

CALUM CARMICHAEL

Cornell University, Ithaca, NY 14853

In order to make novel observations about the role assigned to talion in Exod 21:23–25, Deut 19:21, and Lev 24:18–20, I wish to address first some problems much discussed in the scholarly literature about the Deuteronomic law concerning false testimony (Deut 19:15–21). I shall claim that these problems are resolved on the basis of a straightforward, if sophisticated, approach. We must take seriously the fiction that Moses composed the law. As a prophet Moses anticipated Israel's future problems—for example, the false testimony that resulted in the death of the innocent Naboth, just as he anticipated the people's request for a king. What I am saying, of course, is that the Deuteronomist, living after these events, is Moses. Just as critics readily recognize the Deuteronomist's hand in the presentation of the account of Naboth's death, so we should go further and recognize that the Deuteronomic laws themselves are the collected judgments of the Deuteronomist upon events before Moses's life time, during it, and after it. Fictionally, in the book of Deuteronomy, Moses delivers a farewell address. In doing so, he proceeds in a way that is characteristic of this literary convention: he looks back both on his own life as Israel's leader and on Israel's life before he became leader, and he also anticipates Israel's future. Only those events in his life time are explicitly referred to in order to sustain the fiction.

When we evaluate a particular Deuteronomic law, for example, the one on false testimony, we should not try to relate it to some hypothetical historical background. Such reconstruction of the real world of the past is virtually impossible because of the limited nature of the biblical sources and the lack of extra-biblical corroboration. Instead we should assume that the Deuteronomist is well acquainted with a rule about false testimony, for example, the one in the *Book of the Covenant* (Exod 23:1) that in his time was already attributed to Moses. The same language about "a witness of violence" (*ʿēd ḥāmās*) occurs in both Exod 23:1 and Deut 19:16. What the Deuteronomist has done is to

reformulate an existing rule about false testimony in light of the incident about Naboth.

One problem about the Deuteronomic law is why it has to state that two or three witness-accusers and not one only are necessary in order to prosecute a wrong. For those scholars who recognize this problem of the unnecessary specification of the number of witnesses the solution lies in a historical approach. At some point in Israelite history one witness was sufficient to convict. The inherent injustice of this procedure was eventually seen and at some point the more progressive requirement of a plurality of witnesses was inserted into the law's formulation. This addition to an original text is still manifest, it is claimed, because the law proceeds (in v. 16) to speak of the one man maliciously witnessing against another. Apart from the speculative character of this solution and the attribution of a lack of care to the law's formulator (whose accuracy is taken so seriously by critics when interpreting other matters), its major flaw is the claim that the inherent injustice of accepting one man's testimony without corroboration was not seen from the beginning.¹

The law's content can be viewed differently if we see it as a response to what occurred with Naboth. Jezebel, acting on behalf of her husband Ahab, came up with the idea of bringing a false charge against Naboth, namely, that he had cursed God and the king. She knew, however, that in order to make the charge stick she had to enlist the cooperation of two witnesses who would go along with her malicious charge. From a procedural point of view, she was conforming to proper judicial practice. Her motivation is evil, but her action is correct.² The Deuteronomic lawgiver, in order to indicate that her underlying lawlessness should not confuse the correctness of her procedure, responds to this particular aspect of the narrative. A single person, Jezebel or, as the biblical author perceives it, Jezebel acting for her husband, cannot proceed against a member of the community. Instead two witnesses or more are required, as Jezebel recognized. Her direction in this matter was in line with Israelite legal tradition, the origin of which would be traced to Moses. In stating the law as he does, the Deuteronomist could claim that he was making explicit Moses's judgment of what constituted valid testimony. When the law switches from specifying the number of witnesses required for testimony to a concern with a single false witness the law reflects—in

1. In CH 1–4, some thousand years before the Deuteronomist's time, the need for corroboration is recognized. Morgenstern (1930, p. 35) lays out the common view that the Deuteronomic law is confusing because a later addition modifies the earlier practice.

2. See Daube's profound discussion (1985, pp. 2329–2346) of New Testament and Rabbinic responses to conduct that is externally proper but internally flawed.

the sense that it encapsulates at a more general level—the complex position in the narrative. We should think of a move by the lawgiver from observing the correctness of Jezebel's procedure to observing its underlying reality. One person, Jezebel, stands out as the leading conspirator, but her husband Ahab is held ultimately responsible for the offense against Naboth (1 Kgs 21:19). The dispute between the two men in the law is analogous to the clash between Ahab and Naboth over the latter's ancestral property. When the lawgiver refers to the single false witness, he is perfectly aware that the witness is not acting alone. The situation contemplated can be as devious and complex as the one involving Naboth.

A second problem that can be clarified by relating the law to the narrative is the use in the law of the term "defection" (*sārāh*) in reference to the accused: the false witness testifies against him "defection." Elsewhere in biblical material the term has a religious sense: defecting, turning aside from, rebelling against God (Deut 13:5; Isa 1:5, 31:6, 59:13; Jer 28:16, 29:32). Driver (1902, p. 235) points out that the Deuteronomic context appears to be an exception, in that defection from law and right is the sense. Once we assume, however, that the law has been shaped in light of the Naboth incident the use of the term *sārāh* becomes intelligible. Naboth was accused of cursing God and the king. Such an offense can be accurately characterized as rebellion against God and, further, as a repudiation of this particular society's constitutional structure. The Deuteronomist appears to have drawn out this basic sense when he speaks in his law of the offense as defection. It is nonetheless important to emphasize just how much a particular narrative influences a particular law, so that we should be careful before extending the meaning of *sārāh* in the way that Driver does.

A third, major problem in the law yields a solution when the incident involving Naboth is again brought into association with the law. In the law a case that raises the issue of false testimony apparently bypasses the local courts and goes to the central authority for adjudication. Why is no attempt to adjudicate made at the local level? It cannot be that in the nature of things such a case is too difficult for the local elders to resolve.³ In any event, in the law about taking difficult cases to the central authority, the initial judgment that the matter is too complicated for local decision is made by the local public authority (Deut 17:8). In regard to a case of false testimony this initial step is not even hinted at:

3. The solution of Driver, (1902, p. 236); but he gives no reason why a case involving false witness is more problematic than any other type of case.

"If a false witness rise up against any man to testify against him defection; then both the men, between whom the controversy is, shall stand before Yahweh, before the priests and the judges, which shall be in those days" (Deut 19:16, 17). The institution referred to is the supreme authority assumed to be already in existence when Moses lays down directions for taking difficult cases to it (Deut 17:8–13). Those who constituted it, a judge, or judges, and levitical priests, were made its representatives, so the Deuteronomist understood, after Aaron's failure to exercise supreme authority in the incident of the golden calf (Exodus 32).⁴

Illumination of the problem as to why local adjudication is lacking in the law is immediately forthcoming when we note that the local judiciary in Naboth's city, Jezreel, was also involved in the false testimony against him. Jezebel had sent to the elders and freemen of the city letters in Ahab's name enlisting their cooperation in the false charge against Naboth. In light of this local lawlessness it would appear that the Deuteronomic lawgiver judged that any case of false testimony against a man might involve such widespread local corruption. He consequently directed that the central court always handle any case involving false testimony. How realistic it is to think that many such cases might take on the complexion of the one involving Naboth is difficult to say. It may well be true that a false charge against someone, especially if he is viewed like Naboth (in 1 Kgs 21:6, 7) as awkward in conforming to an expanding governmental authority, requires a good deal of cooperation among those with power in a community. If so, what happened to Naboth presents a not untypical situation. The Deuteronomist's response to arrange for a hearing beyond one's local community would then provide a remedy not just for an incident that might parallel Naboth's, but for many other instances of false testimony too.

The Naboth incident concerns a completed crime, whereas in the law the focus is upon an attempted crime. This difference between the law and the narrative is accounted for precisely because of the relationship between them. Moses, we are to understand, could not possibly tolerate the judicial abomination perpetrated against Naboth. The foundation of his entire system of law is threatened by this particular form of injustice. In response to such a threat, he lays out his law providing for the impartial hearing at the supreme tribunal. He therefore assumes that, because of this safeguard, an instance of false testimony will never go beyond the stage of an attempted crime. The law is an ideal construction.

4. See Carmichael (1985, pp. 95–96).

A problem that might also be illumined by relating law and narrative concerns the *jus talionis* that constitutes the penalty for false testimony. Because of the insidious nature of the offense, we might have expected one severe sanction for most or all forms of false prosecution. Alternatively, while we can see in theory the merit of a talionic sanction for a false accuser who threatens to bring upon someone a certain form of punishment depending upon the type of charge that is brought,⁵ we are left wondering why this principle of punishment is applied in this law and not in the comparable law in regard to the bridegroom who falsely claims that his new wife was not a virgin on her wedding night (Deut 22:13–19). If proved, that charge would have cost her her life, but the lawgiver opts not for a penalty of death but for lesser penalties. We have to wonder why the talionic principle as a response to offenses themselves is not expressed in other Deuteronomic laws, although Eslinger (1981) may be right that the woman who intervenes in the fight and grabs the genitals of her husband's assailant suffers a talionic penalty (Deut 25:11, 12). She has her hand (*kappāh*) cut off, but this term, usually denoting palm, may be hinting at her own genitals. The outcome of the story about Ahab may account for the particular expression of the talionic principle in the Deuteronomic law concerning false testimony.

In the story the deity makes his judgment known through his prophet Elijah, "a prophet like unto me [Moses]" in the Deuteronomic view (Deut 18:15). Elijah holds Ahab responsible for the offense against Naboth: "Hast thou killed, and also taken possession [of the vineyard]" (1 Kgs 21:19). Jezebel herself is to experience death within Naboth's city for her role in his death. It is in regard to Ahab's penalty, however, that we first note that considerable attention is devoted to the principle of talion, and, significantly, the principle is applied to the false charge against Naboth. When we consider that the Deuteronomist is primarily responsible in the narrative histories for showing how retribution, often of a precise, mirroring kind, was visited upon those who offended the deity's requirements, we can readily appreciate that his law on false witness might incorporate similar notions of retribution.

Ahab appropriates Naboth's land. He meets his death attempting to appropriate land, the city of Ramoth-gilead that is in enemy hands (1 Kings 22).⁶ Lies and deception were used against Naboth, whose

5. The principle is expressed in other Near Eastern codes, for example, CH 1–4.

6. Ramoth-gilead, a city of asylum (Deut 4:43), belongs to Israel and could be rightfully reclaimed. However, entitlement was not automatic but dependent upon Israel's, or its representative's, observance of the commandments (cp., e.g., Deut 19:9).

avenger, Elijah, is referred to by Ahab in 1 Kgs 21:20 as his enemy, and they are similarly used in bringing about Ahab's death. The elders of Jezreel were involved in the deception against Naboth; so too are certain established prophets involved in the deception against Ahab. The actions in each case have a judicial setting, an earthly court trafficking in lies in the case of the elders, and a heavenly court in the case of the prophets who come under its influence in speaking lies to Ahab about the successful outcome of the battle. Both Naboth and Ahab are killed while playing uncharacteristic roles. "Proclaim a fast, and set Naboth on high among the people" (1 Kgs 21:9). While enjoying this high position Naboth is accused of cursing God and the king. He dies for this offense. Ahab dresses incognito as a common charioteer in going into battle. He chooses this low position with a view to escaping death, for it is known that the enemy will only go after the king (22:31). He should be safe, in a way perhaps that the honored Naboth should have been against any hostility within his community, but a stray arrow strikes him. The certain man who drew his bow at a venture was deviating from orders, because the king alone was to be killed. We should recall the role of the witnesses against Naboth, sons of Belial as they are called, a description synonymous with deviant conduct: both they and the archer are in fact nameless individuals.⁷ The precise detail of the retribution visited upon Ahab for his offense seems to have inspired the Deuteronomic use of the formula of retaliation in the law.

The formula, it might be suggested, was inspired by the Deuteronomic lawgiver's concentration upon the fate of the dead victim of a corrupt court in 1 Kings 21. For his offense Naboth had been stoned to death: a lifeless body with damage to its diverse members. Taking up from the story with its interest in talion, but focusing, *not upon Ahab*, but upon the wronged man, the lawgiver has judged that that victim's life and limbs cried out for retribution.⁸ The innocence of the victim would all

7. Namelessness appears to indicate that the person functions as a means or a tool (Bailey, 1970, p. 141).

8. In 1 Kings 20 Ahab's life is to be taken because he let his prisoner, King Benhadad, escape. Twice in the story the talionic principle, "life in the place of life," is stated (vv. 39, 42), further evidence that the narratives about Ahab reveal a special interest in talion. That in the histories Ahab's death is tied to the offense against Naboth and not to his leniency to Benhadad, I take as support for my view of the proper way to assess these histories. Literary critics understandably postulate different times and places of origin for the uneven accounts as well as an ill-fitting final arrangement of them. I suggest that such unevenness was of little concern to those who worked with the histories, because the primary aim was to exercise their legal and moral judgment on certain issues that arose in them. Like the Deuteronomic laws themselves, the material was brought together not

the more have inclined the lawgiver to contemplate the end result of the outrage perpetrated against him, especially when the execution was carried out under the direction of a court whose function it is to protect the innocent. In a code, for instance, in this very rule about false witness, that lays much emphasis upon examples of crimes that should be heard about and feared, it would be no surprise that the stoned body of Naboth presented a compelling example.⁹ The story itself reveals this concentration upon his dead body.

In the story there is emphasis not just upon Ahab's death as a mirroring penalty for the slaying of Naboth, but upon his blood after death being consumed by dogs in a way that mirrors what happened to the blood of Naboth after his death (1 Kgs 21:19, 22:38). To paraphrase in language similar to the Deuteronomic law: the penalty of life for life and blood for blood had been exacted.¹⁰ The specific judgment in the story that Naboth's life and blood required precise expiation is readily seen to apply to his life and bodily members. Justice could equally have demanded "life for life, [to be followed by] eye for eye, tooth for tooth, hand for hand, foot for foot" (Deut 19:21). The descriptive nature of this statement begins with the head and moves down to the feet and suggests more the model of a single victim like Naboth than, as is generally understood, different types of victim. The death of Jezebel is equally relevant to the use of the formula. When Jehu comes upon her to carry out retribution for what she had done to Naboth, much attention is devoted to her bodily parts. First she paints her eyes and adorns her head. Then after some words are bandied between them, Jehu orders that the eunuchs in her palace throw her down. Horses trample her, and when the command is given to bury her they "found no more of her than the skull and the feet and the palms of her hands" (2 Kgs 9:35). Her fate, we can infer, is intended to recall Naboth's ghastly end.

On the basis of the preceding discussion we can better approach the difficult problem of the occurrence of the talionic formula (with its addition "burning for burning, wound for wound, stripe for stripe") in Exod 21:22–25, the pregnant woman involved in an affray. Critics, dividing the rule into two parts—the first in which the mother is unhurt

solely according to how one unit related to the one before or after, but because the exploration of a certain topic in a narrative had priority.

9. On the code's concern with the blemish left by wrongdoing, see Daube (1969).

10. The lawgiver's recognition of the need to do something about a slain body is found in Deut 21:1–9: its presence in the midst of the life-giving land requires expiation. The emphasis is upon the body after death — it causes a blemish — and not upon the fact that a life has been taken.

but something untoward happens to the fetuses (the plural is used), and the second in which the mother's fate is the focus—claim that the second part is an addition to the original compilation of rules (the *Mišpāṭīm*) in Exod 21:1–22:16(17). Some of their arguments carry weight, for example, the formula of talion represents a switch uncharacteristic of the *Mišpāṭīm* from the preceding third person form of address to the second person. The addition is attributed to the Deuteronomist.¹¹ After all, he uses the *Mišpāṭīm* in formulating his rules in Deuteronomy, and might well at the same time have found it convenient simply to add on to the material that lay before him. I wish to present different arguments that the rule is Deuteronomic in formulation, but reject arguments such as: that the use of the formula is inconsistent with the pecuniary penalty for the assaulted man in Exod 21:18, 19; and that the formula conflicts with the fine levelled against the assailant in the first part of the rule because the blow to the fetuses is likely to have left a bruise at least on the woman.¹²

There are two Deuteronomic laws that merit attention because of the features they share with Exod 21:22–25: the law about false testimony, because it includes the *jus talionis* (Deut 19:15–21); and the law about the immodest woman, because it is about an affray and it involves the only concern in Deuteronomy with a mutilating punishment to a living person (Deut 25:11, 12). If it were a matter of comparing these two laws with the one in Exod 21:22–25, we could not say too much about any substantial links there might be despite the long recognized, tantalizing nature of the shared features. Once, however, we note the background histories underlying the presentation of the two Deuteronomic laws, we are able to advance beyond the frustrating stage of only comparing and contrasting the three laws in question.

I have argued elsewhere that just as the formulation of the Deuteronomic levirate law (Deut 25:5–10) is dependent upon a reading of the problems thrown up by the Tamar story in Genesis 38, so too the following rule (vv. 11, 12) about the immodest woman owes its bias to an issue raised in the story before Tamar became pregnant.¹³ I shall

11. See Jackson (1973, pp. 303–04).

12. For these arguments, see Jackson (1973, pp. 279–83, 290). On the basis of his insistence that biblical laws must be interpreted in their context, Mikliszanski (1947, pp. 295–98) rejected a literal meaning of “life for life, eye for eye,” etc. He ran into the problem by noting the same conflict that Jackson notes. If he had wished to adhere to his principle, he should have tried to stay with the literal meaning of the formula and sought to reconcile the conflict. He would then have raised doubts about the unintentional character of the attack, and about bodily mutilations as applied to a living person.

13. The two laws are intimately related; see Carmichael (1977, p. 332; 1985, pp. 295–99) and Eslinger (1981, pp. 269–81), although I cannot accept his argument about the tie to

briefly sketch the link between the law and the narrative and then proceed to argue that the second part of the Exodus rule that includes the *jus talionis* is also inspired by the attention that has been given to, in this instance, the pregnant Tamar. Deut 25:11, 12 and Exod 21:22–25 share the same opening language (“If men strive”).

Tamar, acting on behalf of her dead husband against Judah’s failure to make provision to have her impregnated, took the matter into her own hands. Disguised as a prostitute she seduced Judah. From one point of view Tamar was acting wrongfully; from another she was acting justifiably. The law on the immodest woman is interested in Tamar’s initiative in the dispute; the law about the pregnant woman is concerned with the injustice almost meted out to the pregnant Tamar.

Her husband dead, Tamar took up and interfered in the struggle to obtain his right to an heir.¹⁴ Judah was bound by family loyalty to have the dead man’s brother provide one. Avoiding an approach to the brother (Shelah), her interference took the form of deliberately going after Judah’s genitals—to state the development crudely but accurately. In the law two men are engaged in a struggle and the wife of one of them helps her husband by grabbing his opponent’s genitals. The Deuteronomist has produced a more conventional parallel to the situation in Genesis 38, but he nonetheless betrays the inspiration for his rule when he cites the particular form the woman’s action took.

The puzzling second part of the rule in Exod 21:23–25, about the talionic punishment because of what happens to the pregnant woman, becomes less puzzling when we introduce as background the Deuteronomist’s consideration of what almost happened to Tamar when it became known that she was pregnant. In Genesis 38 Tamar presents the example of a pregnant woman who, from Judah’s eventually prevailing view that she was more righteous than he because he had failed to send Shelah into her (v. 26), turned out to be a potentially innocent victim of a capital sentence. Judah, apparently exercising his *judicium domesticum* but making no proper enquiry, had ordered that she be subject to burning.

the tradition concerning Jacob’s struggle with the angel in Gen 32:25–33. It is worth pointing out that the levirate law is concerned with the particular instance of denial of progeny to a man, and in this regard is similar to Exod 21:22 about the loss of the fetuses.

14. The levirate law centers on the problem of the father, presumably dead, who is not available to insist that his son fulfill his levirate duty. Underlying both this law and the following law about the immodest woman are therefore the problems in Genesis 38: first, about a living person, Judah, who in terms of having the levirate custom observed, is “dead,” and must be proceeded against; and second, about a dead person, Er, who because of the levirate custom, is “alive,” and must be fought for.

The major question to be asked of the rule about the pregnant woman is why talionic punishment is laid down. Why, if she loses her life, is it not simply stated in keeping with preceding rules in the code that the person responsible be put to death (*môt yûmat*)? Or (although I shall reject this reading of the text), if physical injury be the harm, that a fine and medical expenses be paid in keeping with the rule in Exod 21:19? It is a bewildering problem—until we look at Tamar’s potential fate, and how its parallel to the Naboth incident has inspired the same application of the talionic principle. If Tamar had been put to death, the issue, like the one prompted by the injustice to Naboth, would have arisen of avenging a woman with child burnt to death because she had rightfully conceived the child for her husband. She had been charged, not maliciously but in the end tantamount to a false charge, with disloyalty to the family she was still tied to despite the death of her husband. She had prostituted herself, it was claimed, to an outsider. The false charge against Naboth was that he had expressed disloyalty to God and the king. The developments that take place in each narrative arise from an initial struggle, a dead man continuing to claim a share in the family inheritance and Naboth resisting Ahab’s acquisition of his ancestral property.

The stoning of Naboth brought about vengeance not just for his death, but also for his blood. In his law about a parallel instance of injustice, the Deuteronomist focused upon avenging the man’s death and bodily members. In regard to outcome, Tamar’s situation differs from Naboth’s and the differences go a long way in accounting for the language and substance of Exod 21:23–25. The law states, “And if there be *ʔāsôn*” (“harm” in RSV, “mischief” in AV, “death” in the *Mekhilta*). The reference is to the fate that might befall the woman. The term has proved to be a difficult one.¹⁵ It occurs only three times outside this law and, significantly now in light of the Deuteronomist’s interest in the threat to the pregnant Tamar, all three occur in the context of the Joseph narrative in which the Judah-Tamar story is embedded. Even more significantly, its meaning in the Joseph narrative has to do with a threat of disaster to a child, Jacob’s youngest son Benjamin, a threat, moreover, that is intended to recall Judah’s past action against Jacob’s favorite son, Joseph.

If Benjamin were made to accompany his brothers to Egypt, as the disguised Joseph had requested, his father feared that *ʔāsôn* might befall him (Gen 42:4, 38, 44:29). In Gen 44:29 Judah himself relays the father’s

15. See Jackson’s discussion of the various attempts to understand it (1973, pp. 274–76).

fears to the disguised Joseph. Benjamin indeed is in Egypt at this point in time, and Judah is pleading with Joseph to let him replace Benjamin, whom Joseph has ordered to remain in Egypt. Judah further asks to become a slave to Joseph (v. 33). The significance of this development is that Judah is being paid back in mirroring fashion for his primary role in selling Joseph as a slave to Egypt (Gen 37:26–28). The reason why the narrative about Tamar is inserted into the Joseph story is the same—Judah is made to experience what it is like to lose sons.¹⁶ Judah almost caused, such is heaven's way of working justice, his own children in Tamar's womb to experience (along with Tamar herself) *ʿāsôn*. The meaning of the term is death (although it is noteworthy that Tamar's potential demise is left similarly unstated), or what would be regarded as its equivalent in Benjamin's situation, slavery abroad. It is an outcome that is so disastrous as to warrant in Judah's words, "bringing down the gray hairs of thy servant our father with sorrow to the grave" (Gen 44:29). Its meaning is such as to rule out breaking up the talionic formula so that mutilation or injury without death is intended to be avenged by talion.

The application of the *jus talionis* in the rule about the pregnant woman differs from its application in the rule about a potential victim of false testimony in at least three respects. Each of the differences is illuminated by taking account of the influence of the Tamar story. First is the difference between avenging a death sentence that a court might impose, because of the nature of the false charge against a man, and avenging a fatal assault upon a pregnant woman. In considering a parallel to Tamar's case, the Deuteronomist does not opt for a wrong that results from some house trial such as Judah's but, continuing the example of the struggle from the first part of the rule, concentrates on an attack upon a pregnant woman.¹⁷ In opting for talionic punishment,

16. See Carmichael (1979, pp. 57–65). Jacob's supposed blessing upon Judah in Gen 49:8–12 is by appearance only. Far from unqualified praise of Judah, the saying is heavily sarcastic and consequently condemnatory. Like Genesis 38 it concerns Judah's action against Joseph and the problems Judah had obtaining offspring to continue his line.

17. Interpreters, assuming that the rule focuses upon an ordinary brawl with an innocent woman bystander, have understandable difficulty in accepting that the attack on the woman is anything other than unintended. See, for example, Cassuto (1967, pp. 174–75), Morgenstern (1930, p. 67) and Paul (1970, p. 74). Yet why should we assume the less complicated situation, especially in legal material? Moreover, Daube's observation (1947, pp. 107–8) that whenever *nāgap* is used with the accusative it refers to a deliberate act is, as Jackson notes (1973, pp. 287–88), telling evidence of the intended nature of the assault. The influence of the Tamar story in shaping the law is further evidence that an intended

however, he is influenced by the nature of the injustice Tamar almost experienced because of the house trial. From one angle, her situation is comparable to Naboth's. Not only his life but his blood also had to be avenged in a precise way. Likewise with Tamar if she had died: the added bodily members, the fetuses, would have had to be avenged along with her dead body. In other words, the talionic formula in Exod 21:23–25 is like the formula in Deut 19:21—it applies to the victim in question and not to types of victim who differ according to the injuries sustained. What also stands out as reminiscent of Naboth is Tamar's innocence of the offense she was accused of. The horror of what happens to an innocent victim is, as already suggested, more likely to evoke a desire for intensified vengeance than if the victim had been partly to blame for a dispute. A further parallel is to be recalled. Naboth lost his God given inheritance, his vineyard. If a true Israelite woman lost her life and child in the way that Tamar almost lost hers, the consequence could be the disappearance of an Israelite's name in the land, in effect, the loss of his God given inheritance, his estate.¹⁸ This aspect of the offense might also highlight why the punishment in the law is intensified. The obliteration of a man's name by causing the death of his wife and child invites obliteration by way of punishment.

The application of talion in Exod 21:23–25 also reflects the role of talion in the Tamar story itself, just as the role of talion in the Naboth story influenced its application in the law on false testimony. As already indicated, the insertion of the story about Tamar into the Joseph narrative is motivated by this very principle: Judah was bringing upon himself the loss of offspring because he had been behind the “death” of Joseph, Jacob's favorite son. We noted too that Judah's later request to Joseph to substitute himself for Benjamin is intended by the narrator to bring out the notion of exact retribution: Judah, having sold Joseph into slavery, was offering himself as a slave to Joseph. The puzzling mode of execution, burning, that Judah ordered for Tamar may well be intended to mirror her offense, her supposed sexual passion.¹⁹ The association

attack is to be understood. Little wonder that the common view, for example, Cassuto's (1967, p. 276), sees a conflict with Exod 21:13: “It is incomprehensible why one who hurts a pregnant woman accidentally should be liable to the death penalty in the case of a fatality, although earlier, in v. 13, it was stated that whoever killed a person unintentionally is not to be put to death.” Scholars, such as Cassuto, have created the problem themselves.

18. The rules about exemption from military conscription couple the man who has just acquired his vineyard in the land and the one who is about to acquire a wife for the purpose of producing his heir (Deut 20:6, 7; 24:5).

19. Astour argues (1966, pp. 193–95) that the burning is to be explained by appeal to an original Canaanite version of the story before it was transformed to fit Israelite tradition.

between sexual passion and burning is well brought out in Prov 6:27–29, “Can a man take fire in his bosom, and his clothes not be burned? Can one go upon hot coals, and his feet not be burned? So he that goeth in to his neighbour’s wife; whosoever toucheth her shall not be innocent.”²⁰ The link between lust and its punishment in the Tamar story would add to Eslinger’s claim (1981, p. 273) that the punishment of the immodest woman in Deut 25:11, 12 similarly mirrors her offense, genitals for genitals.²¹ However, it is the punishment that Judah deserved, if he had proceeded with his execution of Tamar, that is pertinent to the penalty in the law about the pregnant woman. The only approach to this hypothetical issue is to note that Judah would have done to Er what he appeared to have done to Jacob, namely, destroyed his son. Joseph, in his father’s eyes, had been torn to pieces (*tārōp tōrap*, Gen 37:33). Indeed, on his death-bed Jacob identified Judah as the supposed wild beast, a lion, responsible for “coming up from the prey of my son [*miṭterep benī ‘ālītā*]” (Gen 49:9). The penalty in the law would result in a similar tearing to pieces of the offender.

A second difference between the talionic formula in Deut 19:21 and Exod 21:23, 24 is the amplification in the latter: “burning for burning, wound for wound, stripe for stripe.” Again, what almost happened to Tamar may provide illumination. If the formula refers, as I have argued, to a single victim of injustice, then Tamar’s potential fate involving fire may have prompted the amplification: all the gruesome injuries that affected Naboth’s body because of stoning plus burns, wounds, and stripes.²² If the use of fire in the story is meant to mirror her lust, then

Tamar was a cult prostitute, and as a sacred type who prostituted herself outside the sacred order of things burning by fire was the appropriate method of removing her (at least in Babylonian and Assyrian practice, he infers).

20. For the affinity in language between Jacob’s remarks about Judah’s lovemaking in Gen 49:12 and the bridegroom’s description of the bride in Song of Songs, see Carmichael (1979, pp. 64–65).

21. If we are to assume that the rule is intended for societal ends, then we have to think, as Eslinger does, about how such a penalty is to be carried out. If my thesis has merit, no such consideration arises. The rule (in part) is a legal exercise, a hypothetical construction inspired by the attempt to produce a more conventional set of circumstances to those underlying the Tamar incident. The clever use of language is one indication that such rules are not designed to serve practical ends.

22. *kāwā*, the uncommon word in the law, is in Prov 6:28 (the scorching of the adulterer’s feet) a parallel to *šārap* in Prov 6:27 (the burning of his clothes). *šārap* is used in reference to the harlot Tamar’s punishment. In Isa 3:24, the harlots, the daughters of Jerusalem, will experience burning (*kī*) instead of beauty. *peša’* (“wound”) is not a common word either. It is used of the troubles, for example, enticement by harlots, that befall those who imbibe drink (Prov 24:29, 33). In Song of Songs 5:7 the watchmen of the

we need not think of execution being accomplished solely by fire, but by other physical means also so that the variety of injuries to her body would outnumber those to Naboth's. In any event, because the law provides but a parallel to Tamar's situation, it contemplates a variety of injuries that occur before or after death.

A third difference is that the formula in Exodus uses the preposition *tahat* ("in place of") and not *b* ("for") as in Deuteronomy. It is again noteworthy that the narrative about Tamar, because it is dominated by the levirate custom, is concerned with notions of replacement. Onan stands in for Er, and when Onan is struck down, Tamar tricks Judah into being a replacement because he had been reluctant to let Shelah replace Onan. If the pregnant Tamar had been put to death for her activity the attempt to have her child take the place of her dead husband would have failed.²³ In redressing the wrong done to any pregnant woman, the punishment should mirror the offense by somehow bringing in the notion of substitution. The narrative about the wrong done to Naboth does not raise the same notions of substitution.

The discussion of the occurrence of the talionic formula in Exod 21:22–25 might be summarized. It is typical of the Deuteronomist to pursue, in a fashion reminiscent of the sage's counsel in the book of Proverbs, contrasting issues.²⁴ Aside from presenting (in Deut 25:11, 12) an offense by a woman that might parallel Tamar's method of fighting for the rights of her dead husband, he has also been interested in the contrasting aspect: an offense that parallels the wrong that was almost done to the pregnant Tamar. In that the Deuteronomist uses the rules in the *Book of the Covenant* in formulating his, it is quite possible that he added to them also and that these additions are to be found in the *Book of the Covenant*. In other words, only a rule (Exod 21:22) about damage to a fetus is ultimately pre-Deuteronomic because at that stage the focus was partly upon injuries to non-persons, slaves in Exod 21:20, 21, fetuses in Exod 21:22, and slaves again in Exod 21:26, 27. A concern with the mother is out of place in this context, even though it is easily seen how the question of calamity befalling her might arise (cp. CH para. 209, the death of a fetus, followed by para. 210, the death of the mother). It was the Deuteronomist who took the topic about the fetus further, because

city wound the woman as she searches for her lover, possibly because they regard her as a harlot.

23. There is a sense in which the birth of a male child has this significance independent of the special circumstances of the levirate situation.

24. On this aspect of setting down instruction, see Carmichael (1985, pp. 213, 297–98, 301).

in characteristic fashion the narrative about Tamar encouraged him to do so, and he consequently raised the issue of death to the mother. The Tamar story—scrutinized, we might imagine, in a school setting for legal, instructional purposes—would explain the very real puzzle as to why a rule about a pregnant woman should include the punishment of talion. The similarity the Deuteronomist found between what occurred with Naboth and what might have happened to Tamar is the link. This link was further encouraged because the Tamar story had in another context prompted a rule that required a mutilating penalty.

Before turning to Lev 24:19, 20, I wish to indicate that even the first part of the rule about the fetuses in Exod 21:22 may owe a good deal also to the typical Deuteronomic process of formulating a law by bringing it into connection with a narrative. It is beyond the scope of this article to indicate why the topic of a blow to a pregnant woman first arose in the context of the *Book of the Covenant*. Obviously, an enquiry into the rules concerning assault that precede it, for example the immediately preceding one about a blow to a slave, is relevant, as is perhaps the recognition that had to be given to Moses's role as a judge of quarrels in Exod 2:11–14. However the topic arose, the influence of the Tamar story upon a rule on the subject is again observable.

If Tamar had died, her death would have been the consequence of the peculiar struggle between Er and his father and brother. Er pressured Judah from his grave to exercise his *patriapotestas* to ensure that another of his sons fulfilled the levirate duty. Onan acted against his dead brother (and against his father also). Judah, failing to replace Onan with Shelah, was in turn also acting against Er. It was at this stage that Tamar intervened in the struggle on behalf of her dead husband. She became pregnant with twins. An exploration of this set of circumstances, for the purpose of pursuing a legal topic in a hypothetical fashion, illuminates the text of Exod 21:22 in which the pregnant mother is unhurt but “her children come out.” Interpreters have been puzzled by this reference to children rather than to a single child. They have been puzzled too by the details of the struggle: it is not necessarily confined to two men, who are described as having struck her, although only one of them is held accountable.²⁵ The conflict involving three men in Genesis

25. As Jackson points out (1973, pp. 287–88), it is the LXX and Syriac versions that contemplate a fight between two men. The MT has no such restriction and Jackson thinks of a number of men as participants. Cassuto implausibly claims (1967, p. 275) that we are dealing with a generic plural in each instance to indicate that one or other of the combatants hurt her and that the fetus may be male or female. Morgenstern (1930, p. 67), noting that the Samaritan and Septuagint versions read the singular, took the MT as

38, one of whom in the end directly moved against Tamar, and Tamar's twin children would explain the puzzling references in the rule. We might also point out that the Tamar incident would also solve a puzzle noted by many interpreters as to how it could be known that, in the event of a fatal assault to the woman, she was pregnant at the time. Tamar was at least three months advanced in pregnancy when Judah judged that she had played the harlot (Gen 38:24).

Another major crux in the rule is resolved if we consider the influence of the narrative. Should the children be the only ones to suffer, the man responsible is liable to monetary damages "according as the woman's husband lays upon him." The rule then continues, *venātan biplilim*, and interpreters have viewed this statement about the involvement of judges as being at odds with the preceding one that gives the husband an unfettered right to obtain the sum of money he claims as compensation. Jackson lays out the many attempts to resolve the conflict and finds them all suspect, except for Daube's solution.²⁶ Daube claims that the clause is an interpolation belonging to a time when private disputes were attracting public interest, because the aim was to curtail the resort to self-remedies. No problem in the text exists, however, once we observe that the rule also takes into account a situation that might parallel the hypothetical one suggested by the Tamar story. In other words, the rule first states the normal position in which the husband is alive and can make his claim. It then turns to the exceptional situation where the husband is dead and requires the claim to be made with judges. The text therefore reads, "And if men strive and strike a pregnant woman and her children come out, and death [to the mother] does not ensue, he [the one who struck her] shall be strictly fined according as the woman's husband shall lay upon him, or he shall pay through judges." In *venātan biplilim* the *vav* connects an alternative case as in, for example, Exod 21:16; the *bêth* has the sense of instrument or means by which the payment is made.

The two texts, Exod 21:23–25 and Deut 19:15–21, that contain the talionic formula are not about talion as generally understood. Rather they are about intensified vengeance or the intensification of the death sentence, "*eine Verschärfung der Todesstrafe*."²⁷ A parallel instance would be the practice recognized in Deut 21:22 where a man is first put

original and wondered whether, because the text was legal writing, the assumption is not in fact that the woman might have been carrying twins.

26. See Jackson (1973, pp. 277–79) and Daube (1947, pp. 108, 149 n. 14).

27. The expression of Keil and Delitzsch (1870, p. 510), in regard to the law about the hanged man (Deut 21:22, 23).

to death and his body incurs disgrace by being then hung up for public gaze. Only in Lev 24:19, 20 does the formula truly refer to talionic punishments. The relationship between the Deuteronomic and Levitical laws is complex. Detailed examination of similar material proves conclusively, however, that the Levitical laws, or at least their formulations, are later.²⁸

In explaining the occurrence of the talionic formula in Deut 19:15–21 by appeal to the Naboth incident, we can go further and claim that the formula as such is original to the Deuteronomic law about false testimony.²⁹ This claim is based on the observation that the detailed concern with what happened to the bodies of Ahab and Jezebel is the primary inspiration for its composition. If we assume, as we are encouraged to do by the often striking nature of the parallel material, that the Levitical writer knew the Deuteronomic material, then Lev 24:10–23 provides a further example of such parallelism.

After the initial, unresolved dispute between Ahab and Naboth, there followed the false accusation that Naboth had reviled God and the king. The false charge of blasphemy led to a capital sentence from the corrupt judicial authorities. Out of this complex context, because the sentence in fact constituted murder, comes the Deuteronomist's rule about the application of talion. In Lev 24:10–23 the issue is also about an unresolved quarrel between two men, and one of them, a non-Israelite, proceeds to revile God. Then into the context of a judicial enquiry that pronounces a death sentence upon the blasphemer comes the statement of an apparently existing rule, presumably one that applied to Israelites previously, about the punishment for a blasphemer and, most puzzling, a rule about murder, which in turn, just as in Deuteronomy, leads to rules about the application of talion.³⁰ If we were to set out the Deuteronomist's procedure as comparable to the priestly writer's we

28. See Carmichael (1982, pp. 411–12) and (1981, pp. 35–37); also Jackson (1973, pp. 303–04).

29. As Jackson notes (1973, p. 300), no ancient Near Eastern source formulates the law of bodily injuries by the use of maxims.

30. Although Noth (1965, p. 180) regards the rules about murder, killing a beast, and bodily injuries as being insertions from elsewhere, he gives no reason why it is these rules that are inserted and not others. He indicates, without any argumentation, that they were already attached to a rule about blasphemy and that the latter's insertion drew the others along with it. Should this observation be correct, we would still wish to know why a prohibition about blasphemy is followed by the prohibition against murder. During a summer seminar for College teachers that I directed for the National Endowment for the Humanities in 1985, Professor Walter Renaud, William Woods College, Fulton, Missouri, suggested that the topic of murder and bodily injuries might arise in the context of

would have: the dispute between Ahab and Naboth that led to the alleged offense of blasphemy; the trial to determine the offender's fate, namely, death for the blasphemer; a rule about false testimony, because the death sentence was tantamount to the crime of murder; and the application of talion. The intricate nature of the two parallel contexts is such as to rule out coincidence and to assign precedence to the Deuteronomic sequence.

The Levitical writer covers ground similar to the Deuteronomist's, but in his own terms and partly with an eye to generalization and systematization. In doing so, he may be reacting negatively to the Deuteronomist's narrow application of the talionic principle. What might motivate his reaction is difficult to say. Possibly he first reacts to the complexity of the Deuteronomist's procedure, because it deals with a fabricated offense, by setting down a corresponding account of a true case of blasphemy. He then proceeds to oppose the Deuteronomist's concern with a criminal after his death, perhaps because of priestly opposition to too much involvement with a dead body. In any event, we can claim that the Levitical writer sets down the rule against murder after the pronouncement of the death sentence upon the blasphemer because the Deuteronomist's procedure determines his.³¹

In the Deuteronomist's case of blasphemy the true offender turned out to be the one who murdered Naboth, Ahab being explicitly condemned for the murder in 1 Kgs 21:19. It was Ahab's death, and his wife's, that raised the topic of talion both in the episode and in a legal context (the law about false testimony). The priestly writer takes up the topic of talion but not as it applies to the dead body of a criminal. Thus he does not apply the phrase "life for life" in regard to murder. Instead he separates it from any link with murder and gives it an application that requires a living creature: one who causes the death of an animal has to provide a live one in its place.³² He then applies the principle of talion,

Lev 24:10-23 because of the initial quarrel between the two men. However, as he also pointed out, the inclusion of a rule about causing the death of an animal would not fit this explanation.

31. To be sure, he pursues other aims also, in particular, the application to an alien as well as to an Israelite of the law about cursing the name of the Israelite god. In this regard, a typical Deuteronomic procedure is worth recalling: laws are formulated in response to problems that arose between Israelites and non-Israelites (e.g., Simeon and Levi and the Shechemites in Genesis 34), or problems involving half-Israelites (Er, Onan, and Shelah have a Canaanite mother). For this procedure, see Carmichael (1985, pp. 185-205).

32. It is thus the attention given to the talionic principle that determines why a rule about causing the death of an animal should follow one about murder. The juxtaposition of the two rules is, in the absence of some such consideration, strange. Morgenstern (1930,

for which he had a Deuteronomic precedent in Deut 25:11, 12 (the immodest woman), to living persons who have suffered bodily mutilations. Repeating the two rules (only in reverse order this time) about murder and the death of an animal, he relates the actual stoning of the blasphemer.

We have then the sequence in Lev 24:13–23: a blasphemer is to be stoned, he is to be put to death; a murderer is to be put to death; one who kills another's animal is to give a live animal, life for life; one who disfigures someone is to be disfigured himself, fracture for fracture, eye for eye, tooth for tooth; one who kills an animal is to make it good; the murderer is to be put to death; the blasphemer is stoned to death. There may be a deliberate attempt to break up the unitary character of the Deuteronomic formula. Not only is "life for life" separated from bodily mutilations, but it is also no longer linked to murder. Indeed, in the repeated statement about the death of an animal the phrase is not repeated. The omission could be an indication of the Levitical writer's intention to remove the talionic formula from its association with death, the Deuteronomist's sole use of it.

I have argued that in the Old Testament the four legal texts (Exod 21:22–25; Deut 19:15–21, 25:11, 12; Lev 24:18–20) concerning talion prove to be closely related to one another. That this may be a surprising result is perhaps indicated by the scattered nature of the texts in question and the different contexts in which they are found.³³ Aside from the far from insignificant talionic element, another indication that there might be more in common than would appear is that each text concerns a dispute, and obviously the question of talion need not arise solely in regard to conflicts: "If men strive" (Exod 21:22 and Deut 25:11, 12); "The men between whom the controversy is" (Deut 19:17); and "This son of the Israelitish woman and a man of Israel strove in the camp" (Lev 24:10). The interest in talion comes from narrative accounts, as we might possibly expect, because narrative so often provides scope for expressing the universal and ageless concern with retaliation that is of a precisely mirroring kind.³⁴

pp. 78–79) thinks it is "sheer nonsense" to apply "life for life" to the repayment of a living animal for a dead one. "Animal for animal" should have been used, he asserts. He has a point, but all the more is the question raised why "life for life" was used. Its use suggests that the Levitical writer was reacting against its previous use.

33. It is certainly a result far removed from the assessment of a recent critic who, representing a common view, states in regard to Exod 21:23–25, Deut 19:15–21, and Lev 24:18–20 that the formula of talion "is a quotation in all three passages with no essential connection with its context" (Mayes, 1981, p. 291). Underlying such judgments is a demeaning view of the abilities of the supposed interpolators.

34. Just how extensive a feature talion in different senses is, see Daube (1981, pp. 51–60).

BIBLIOGRAPHY

- Astour, M. 1966. "Tamar the Hierodule." *Journal of Biblical Literature* 85:185–196.
- Bailey, J. A. 1970. "Initiation and the Primal Woman in Gilgamesh and Genesis 2–3." *Journal of Biblical Literature* 89:137–150.
- Carmichael, Calum M. 1977. "A Ceremonial Crux: Removing a Man's Sandal as a Female Gesture of Contempt." *Journal of Biblical Literature* 96:321–336.
- . 1979. *Women, Law, and the Genesis Traditions*. Edinburgh.
- . 1981. "The Law of the Forgotten Sheaf." *Society of Biblical Literature Seminar Papers* 20:35–37.
- . 1982. "Forbidden Mixtures." *Vetus Testamentum* 32:394–415.
- . 1985. *Law and Narrative in the Bible*. Ithaca.
- Cassuto, U. 1967. *A Commentary on the Book of Exodus*. Jerusalem.
- Daube, David. 1947. *Studies in Biblical Law*. Cambridge.
- . 1969. "To be found doing wrong." *Studi in onore di Edoardo Volterra*. Pubblicazioni della Facolta di Jurisprudenza dell' Universita di Roma 41:3–13.
- . 1981. "Fraud on Law for Fraud on Law." *Oxford Journal of Legal Studies* 7:51–60.
- . 1985. "Encomium Prudentiae." *Principat* 25 (Berlin) 2329–2346.
- Delitzsch, F. and C. F. Keil. 1870. *Commentar über das Alte Testament* 2.1 2nd ed. Leipzig.
- Driver, S. R. 1902. *Deuteronomy* 3rd ed. Edinburgh.
- Eslinger, L. 1981. "The Case of an Immodest Lady Wrestler in Deuteronomy xxv 11–12." *Vetus Testamentum* 269–81.
- Jackson, 1973. "The Problem of Exod xxi 22–5 (*Jus Talionis*)." *Vetus Testamentum* 23:273–304.
- Keil, C. F. and F. Delitzsch. 1870. *Commentar über das Alte Testament* 2.1 2nd ed. Leipzig.
- Mayes, A. D. H. 1981. *Deuteronomy*. Grand Rapids.
- Mikliszanski, J. K. 1947. "The Law of Retaliation and the Pentateuch." *Journal of Biblical Literature* 66:295–303.
- Morgenstern, J. 1930. "The Book of the Covenant." *Hebrew Union College Annual* 7:19–258.
- Noth, M. 1965. *Leviticus*. Philadelphia.
- Paul, S. M. 1970. *Studies in the Book of the Covenant in the Light of Cuneiform and Biblical Law*. Leiden.